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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BENJAMIN FREDIEU, Defendant and Appellant.	E064195 (Super.Ct.No. FRE006521) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. William Jefferson Powell IV, Judge. Affirmed.

Rex Adam Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Barry Carlton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Benjamin Fredieu, appeals from the order of the superior court summarily denying his petition to redesignate his 2003 felony commercial burglary conviction as a misdemeanor under Proposition 47. (Pen. Code, § 1170.18, subds. (f), (g).)[1] The petition was unaccompanied by any evidence that the conviction qualified as a misdemeanor, including misdemeanor shoplifting, under Proposition 47. (§ 459.5.) Defendant did not request a hearing on his petition (§ 1170.18, subd. (h)), and no hearing was conducted. The court summarily denied the petition without stating its reasons.

Defendant claims his petition was erroneously denied because (1) the People stated in their form response to the petition that he was "entitled" to have his 2003 conviction reduced to a misdemeanor, and (2) the 2003 report of the probation officer, prepared in connection with defendant's sentencing on the 2003 conviction, "shows" that the conviction qualifies as misdemeanor shoplifting under Proposition 47. The probation report indicates that the 2003 conviction would qualify to be reduced to a misdemeanor shoplifting conviction under Proposition 47, because it indicates that the 2003 conviction was based on defendant's theft of $167.14 worth of items from a Walmart store during normal business hours (§ 459.5), but the probation report is based on inadmissible hearsay (Evid. Code, § 1200).

We conclude that the petition was properly denied. Neither the petition nor the People's response contained or referred the court to any evidence sufficient to allow the court to find the 2003 conviction was based on conduct that now constitutes

[1] Unspecified statutory references are to the Penal Code.

misdemeanor shoplifting, or any other misdemeanor, under Proposition 47. The parties did not refer the court to the 2003 probation report. Moreover, defendant did not affirm by a declaration based on his personal knowledge, nor did the parties stipulate, that the crime was based on the $167.14 theft indicated in the probation report.

The record is silent on what documents, if any, the court reviewed in denying the petition, apart from the petition and response. Because neither party directed the court to any evidence to support granting the petition, the court was not required to look beyond the pleadings. For example, the court was not required to review the court file, including the record of the 2003 conviction or the probation report prepared in connection with defendant's sentencing on the 2003 conviction, in a potentially vain search for evidence to support the petition. In sum, defendant has not demonstrated reversible error. Summary denial of the petition was proper based solely on the factually deficient petition and response.

We affirm the order denying the petition without prejudice to defendant's refiling a factually-supported petition. If affirmed by defendant in a declaration based on his recollection of his 2003 offense, or if submitted to the court as undisputed in a stipulation by the parties, the facts indicated in the probation report would be sufficient to support granting a refiled petition. On this record, we discern no reason why the court would not grant the petition, or accept the parties' stipulation, if the same were based on such facts.

I. BACKGROUND

A. *Applicable Provisions of Proposition 47*

In the November 4, 2014 election, California voters enacted Proposition 47, "The Safe Neighborhoods and Schools Act" (Proposition 47 or the Act) and the Act went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors.)" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.)

Proposition 47 added a new statute defining shoplifting to the Penal Code, section 459.5, and a new sentencing provision, section 1170.18. (*People v. Rivera*, *supra*, 233 Cal.App.4th at p. 1091.) "Shoplifting" is defined as "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a).) Shoplifting is required to be punished as a misdemeanor, unless the defendant has a disqualifying prior conviction described in section 667, subdivision (e)(2)(C)(iv), or is required to register under section 290, subdivision (c). (*Ibid*.)

Under subdivision (f) of section 1170.18, a person who has completed his or her sentence for a felony conviction that would have been a misdemeanor under the Act may apply to the court that entered the judgment of conviction to redesignate the conviction as

a misdemeanor. The court is required to designate the conviction as a misdemeanor "[i]f the application satisfies the criteria in subdivision (f) [of section 1170.18]." (§ 1170.18, subd. (g).) Unless the applicant requests a hearing, "no hearing is necessary to grant or deny an application filed under subsection (f)." (§ 1170.18, subd. (h.)

B. *Defendant's Petition and the People's Response*

In October 2003, defendant, then 19 years of age, was charged with second degree commercial burglary, a felony. (§ 459.) He pled guilty to the charge and was sentenced to probation. In 2004, he violated probation and was sentenced to two years in prison. On May 5, 2015, after he completed his sentence on his 2003 conviction, defendant filed a form petition (SBSC form #13-20067-360 revised 12/11/14) asking the court to reclassify the 2003 conviction as a misdemeanor pursuant to Proposition 47.

Defendant's form petition was unaccompanied by any evidence showing that the 2003 burglary would have been misdemeanor shoplifting or any other misdemeanor had the burglary been committed after Proposition 47 went into effect. (§§ 459.5, 1170.18, subds. (f), (g).) Defendant attached a declaration to his petition, signed under penalty of perjury, stating he had completed his sentence on his 2003 conviction and was asking the court to reclassify the conviction as a misdemeanor. Defendant affirmed that he had no disqualifying prior convictions described in section 667, subdivision (e)(2)(C)(iv), or requiring registration under section 290, subdivision (c).

Neither the petition nor defendant's declaration described the circumstances of the 2003 burglary, including whether it was based on his entry into a commercial establishment during normal business hours, or whether the value of property taken or intended to be taken was $950 or less. (§ 459.5.) Defendant did not request a hearing on his petition. Had he requested a hearing, the court would have been required to hold a hearing and allow defendant to present evidence in support of his petition. (§ 1170.18, subd. (h) ["Unless requested by the applicant, no hearing is necessary to grant or deny an application filed under subsection (f)."].)

The People filed a form response (SBSC form #13-20068-360 revised 12/11/14), conceding that defendant had completed his sentence and was "entitled to have the felony conviction(s) designated as misdemeanor(s)." But like the petition, the response contained no evidence that defendant's 2003 conviction met the statutory definition of misdemeanor shoplifting (§ 459.5), or any other misdemeanor.

C. *The Record of the 2003 Conviction and the 2003 Probation Report*

The record of the 2003 conviction indicates it was based on defendant's entry into a Walmart store with the intent to commit "larceny and any felony," but the record of the conviction contains no evidence of the value of property taken or intended to be taken during the burglary. As defendant concedes, "[n]othing in the complaint or in [his] [guilty] plea . . . form describes the circumstances of the offense or the value of any property intended to be taken."

The record on appeal includes a probation report, filed on November 17, 2003, in connection with defendant's sentencing on the 2003 conviction. The probation report contains hearsay statements, apparently from a Walmart store loss prevention officer and police officer, indicating the burglary meets the statutory definition of shoplifting under proposition 47 (§ 459.5) because it was based on defendant's theft of items worth $167.14 from a Walmart store during normal business hours.[2]

D. *The Summary Denial of the Petition*

On June 29, 2015, the court denied the petition without stating its reasons for the denial. Neither defendant nor the People directed the court's attention to the probation report in their pleadings or at any other time, and the record is silent on whether the court saw the probation report before it ruled on the petition.

II. DISCUSSION

Defendant claims his Proposition 47 petition was erroneously denied because "the parties agree and the record shows" his 2003 conviction constituted misdemeanor shoplifting under section 459.5. Defendant relies on the People's response, conceding he was "entitled" to have his 2003 conviction reclassified as a misdemeanor, and the 2003

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[2] The probation report states: "Specifics of the criminal offense and the arrest of the defendant are detailed in the Redlands police report #0310009337. The defendant was arrested on October 2, 20013, and charged . . . with second degree commercial burglary . . . . [¶] On October 2, 2003, a loss prevention officer observed the defendant entering the Wal-Mart Store on Redlands Boulevard. The officer followed the defendant and saw him select merchandise and then put the merchandise in a Wal-Mart bag that he took from his pocket. The defendant left without paying for the items. Loss prevention officers stopped him and the $167.14 worth of merchandise was recovered. The defendant admitted that he came in to steal the items. . . ."

probation report which contains hearsay statements indicating that the conviction met the statutory definition of shoplifting. For the reasons we explain, the petition was properly denied based on the factually deficient petition and response.

A. *Section 1170.18 Requires the Trial Court to Make a Factual Determination That the Subject Felony Conviction Would Have Been a Misdemeanor*

In interpreting a voter initiative like Proposition 47, we apply the same principles that govern statutory construction. (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1264.) "'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.'" (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) In determining the voters' intent, we begin with the language of the statute itself. (*People v. Rivera*, *supra*, 233 Cal.App.4th at p. 1100.) We give the words their ordinary or plain meaning, and if there is no ambiguity, the plain meaning of the language governs our interpretation. (*Ibid*.) We must also construe the language in the context of the statute as a whole and the overall statutory scheme. (*People v. Arroyo* (2016) 62 Cal.4th 589, 593.)

Section 1170.18 allows a defendant who has completed his or her sentence for a felony conviction that would have been a misdemeanor under the Act to apply to the court that entered the judgment of conviction for an order redesignating or reclassifying the conviction as a misdemeanor. (§ 1170.18, subd. (f).) The statute provides that, "[i]f the application satisfies the criteria in subdivision (f), the court shall designate the felony offense . . . as a misdemeanor." (§ 1170.18, subd. (g).) And, "[u]nless requested by the

applicant, no hearing is necessary to grant or deny an application filed under subsection (f)." (§ 1170.18, subd. (h).)

These provisions plainly and unambiguously require the superior court to determine that the subject felony conviction would have been a misdemeanor under the Act, as a condition precedent to granting the petition and redesignating the former felony conviction as a misdemeanor. As courts have recognized in the context of analogous petitions for resentencing under Proposition 47 (§ 1170.18, subd. (a)), the determination that a former felony now constitutes a misdemeanor is inherently factual and must be made by the trial court in the first instance, not by an appellate court. (*People v. Contreras* (2015) 237 Cal.App.4th 868, 892; *People v. Hall*, *supra*, 247 Cal.App.4th at p. 1263.) "[T]o qualify for resentencing under the new shoplifting statute, the trial court must determine whether defendant entered 'a commercial establishment with intent to commit larceny while that establishment [was] open during regular business hours,' and whether 'the value of the property that [was] taken or intended to be taken' exceeded $950." (*People v. Contreras*, *supra*, at p. 892.)

As this court and others have recognized, the evidence to support the trial court's factual determination that the felony conviction constitutes a misdemeanor under Proposition 47 "may come from within or outside the record of conviction, or from undisputed facts acknowledged by the parties." (*People v. Hall*, *supra*, 247 Cal.App.4th at p. 1263; *People v. Perkins* (2016) 244 Cal.App.4th 129, 140, fn. 5 [petitioner may present any probative evidence to meet his or her initial burden of showing the felony is a

misdemeanor under Proposition 47]; *People v. Johnson* (July 26, 2016, D068384) ___Cal.App.4th ___ [2016 Cal.App. Lexis 612 [at *22-*29]] [same].)

B. *A Proposition 47 Petitioner Has the Initial Burden of Making an Initial Prima Facie Evidentiary Showing That the Felony Conviction Would Be a Misdemeanor*

Section 1170.18 is silent on who has the burden of demonstrating that the subject felony conviction constitutes a misdemeanor under the Act. (*People v. Perkins*, *supra*, 244 Cal.App.4th at p. 136.) At the time defendant filed his petition in May 2015, and when the petition was denied in June 2015, there were no appellate opinions providing guidance on the burden of proof question. But since August 2015, several final appellate opinions, including two from this court, have interpreted and applied section 1170.18 as requiring the petitioner to make an initial prima facie evidentiary showing that the subject felony constitutes a misdemeanor. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449-450; *People v. Perkins*, *supra*, 244 Cal.App.4th at pp. 136-137; *People v. Johnson*, *supra*, ___ Cal.App.4th ___ [2016 Cal.App. Lexis [at *22-*29]; see also *People v. Bush* (2016) 245 Cal.App.4th 992, 1007-1008 [recognizing the defendant had initial burden of proving his eligibility for resentencing and concluding he met burden].)

As explained in *Sherow*, a party ordinarily has the burden of proving each fact, the existence or nonexistence of which is essential to the claim for relief or defense the party is asserting. (*People v. Sherow*, *supra*, 239 Cal.App.4th at p. 879.) This rule is based on

Evidence Code section 500,[3] which "places the burden of proof in any contested matter on the party who seeks relief. . . . 'That is, if you want the court to do something, you have to present evidence sufficient to overcome the state of affairs that would exist if the court did nothing.' [Citation.]" (*Vance v. Bizek* (2014) 228 Cal.App.4th 1155, 1163, fn. omitted.)

C. *Insufficient Evidence Was Presented to Support Granting the Petition*

Like the defendants' petitions in *Sherow*, *Rivas-Colon*, and *Perkins*, defendant's petition was "completely 'devoid of any information about the [felony commercial burglary] offense[]'" that he sought to reduce to a misdemeanor shoplifting conviction under Proposition 47. (*People v. Rivas-Colon, supra,* 241 Cal.App.4th at p. 449; *People v. Sherow, supra*, 239 Cal.App.4th at p. 878; *People v. Perkins*, *supra*, 244 Cal.App.4th at p. 137.) The petition thus failed to make an evidentiary showing sufficient to allow the court to find that the 2003 conviction was based on conduct that now constitutes shoplifting under Proposition 47. (See generally *Doe v. Gangland Productions, Inc.* (9th Cir. 2013) 730 F.3d 946, 957 [a prima facie evidentiary showing is a showing of facts which, if credited or presumed to be true, are sufficient to sustain the legal determination the proponent of the evidence seeks].) Though the People did not dispute that defendant had no prior convictions which would have disqualified him from reducing this 2003

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[3] Evidence Code section 500 states: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

conviction to misdemeanor shoplifting (§ 459.5, subd. (a)), this concession did not satisfy defendant's burden of proving the facts underlying the 2003 conviction.

Likewise, the People's responsive concession that defendant was "entitled" to the relief he was requesting did not fill the evidentiary gap left by the petition. The response provided no evidence and admitted no facts sufficient to show that the 2003 conviction met the definition of misdemeanor shoplifting. (§ 459.5.) In light of the factually deficient petition, the court was not required to accept the People's unsupported concession. Summary denial of the petition was proper based on the factually deficient petition and the People's equally factually deficient eligibility concession.

Though the 2003 probation report indicated that the 2003 conviction qualified as misdemeanor shoplifting (§ 459.5), the parties did not direct the court's attention to the 2003 probation report in their pleadings, or at any other time. And even if one or both of the parties had merely referred the court to the probation report, the court would not have been required to grant the petition based on the hearsay statements in the probation report if it did not find them to be reliable. "[A] [probation] report is not evidence" (*People v. Overton* (1961) 190 Cal.App.2d 369, 372) and, unless an exception applies, hearsay evidence is not admissible (Evid. Code, § 1200).

We observe that if the defendant wished to rely on the facts indicated in the probation report to support his petition, he could have simply affirmed those facts in a declaration attached to his petition, based on his personal knowledge and recollection of those facts, but he did not do so. Nor did the parties stipulate to the facts in the probation

report that the 2003 conviction was based on defendant's theft of $167.14 worth of items from a Walmart store during normal business hours.

In sum, defendant has not demonstrated reversible error. "The most fundamental rule of appellate review is that an appealed judgment or order is *presumed to be correct*." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶ 8.15, p. 8-5.) "'All intendments and presumptions are indulged to support [the judgment or order] on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) For the reasons explained, summary denial of the petition was proper based solely on the factually deficient petition and response.

Lastly, because "the ground rules" for making an initial prima facie evidentiary showing in a Proposition 47 petition were unsettled when defendant filed his petition in May 2015, defendant may refile his petition, along with his declaration under penalty of perjury of facts that, if credited, show he is eligible for resentencing on his 2003 burglary conviction. (*People v. Sherow*, *supra*, 239 Cal.App.4th at p. 881 [affirming order denying Proposition 47 petition "without prejudice to subsequent consideration of a properly filed petition."].)

III. DISPOSITION

The June 29, 2015, order denying defendant's Proposition 47 petition is affirmed without prejudice to the subsequent consideration of a properly filed and factually supported petition.

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CODRINGTON
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.